SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

September Term, 1974

No. 73-1045

LUIS CHARBONIER and
RAUL CHARBONIER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BARRY A. COHEN of
ANTINORI, COHEN & THURY, P.A.
406 Morgan Street
Tampa, Florida 33602

Attorneys for Petitioner

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

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IN THE

Supreme Court of the United States

SEPTEMBER TERM 1974

NO. 73-1045

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RAUL CHARBONIER and LUIS CHARBONIER,

Defendants-Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Raul Charbonier and Luis Charbonier respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which opinion was rendered on June 12, 1974 and Petition for Rehearing was denied on August 9, 1974.

OPINION BELOW

The Opinion of the Fifth Circuit Court of Appeals is reported at 495 F 2nd 1226 attached hereto and incorporated herein.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1974. The Petition for Rehearing was denied on August 9, 1974. (Appendix 2)

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Rule 19(b) of the Supreme Court of the United States.

QUESTIONS PRESENTED

First. Whether the prosecutorial misconduct in this cause denied the defendants' right to a fair trial and due process of law.

Second. Whether the statement made by the Government prosecutor during his summary argument that

> "defense counsel stated that while they were not there and I wasn't there - I want to point out to you, Ladies and Gentlemen, that the people who were there were all the witnesses who testified to the facts and all of the defendants, and they were there when this occurred; And you have the testimony as to what happened"

violated the self-incrimination clause of the United States Constitution as a direct or indirect comment on their failure to testify in violation of the Fifth Amendment of the United States Constitution.

Third. Did the Court deny the defendants a fair trial by refusing to give the following requested instructions to-wit:

1. "The testimony of an admitted perjurer should always be considered with caution and weighed with great care." Federal Jury Practice and Instructions, Devitt and Blackmar, § 12.03

2. The Falsus in Uno and Falsus in Omnibus instruction.

particularly when a key government witness, Fano Ciaccio admitted lying under oath when these very defendants were on trial in the State Court and further when the prosecutor in this cause had to advise the jury that the witness was lying under oath before the Trial Court in this case.

Fourth. The same constitutional issues raised in the Petition for a Writ of Certiorari by the Petitioners, James Burke, Louis Lopez and Henry Hill, in Case No. 72-3742 which was consolidated with Case No. 73-1045 before the Fifth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

CONCISE STATEMENT OF THE CASE CONCERNING FACTS MATERIAL TO QUESTIONS PRESENTED

The Federal Grand Jury, for the Middle District of Florida, indicted the Petitioners in a five count indictment, charging the Petitioners, Raul Charbonier and Luis Charbonier, in Count I with violations of Section 2 and 892 of Title 18 of the United States Code; in Count II with violations of Section 2 and 894, Title 18 of the United States Code; in Count III with violations of Section 2 and 1952 of Title 18 of the United States Code; in Count IV with violations of Section 2 and 1952 of Title 18 of the United States Code; and in Count V with violation of Section 2 and 1952 of Title 18 of the United States Code. (Appendix 4, pp. 1-5)

The trial commenced in the Middle District of Florida before the Honorable Ben Krentzman and concluded

on November 2, 1972, with a finding by the jury that the Petitioners, Raul Charbonier and Luis Charbonier were guiity of all Counts of the Indictment. Petitioners, Raul Charbonier and Luis Charbonier were sentenced to a term of 10 years each on Counts I and II and five years each on Counts III, IV and V, all to run concurrent with the sentences imposed in Count I.

A Motion for New Trial was timely filed and denied. Petitioners appealed to the Fifth Circuit Court of Appeals which Appeal was denied as was the Petitioners' Petition for Rehearing.

That the State of Florida did indict the Petitioners for the alleged offenses of assault with intent to commit murder in the first degree, kidnapping and extortion, which offenses allegedly involved not only the same defendants, but the exact same circumstances upon which the Federal indictment was predicated. That said defendants were tried by the State of Florida and acquitted on all charges. (Appendix 5)

In compliance with Rule 23(1)(e), the following matters are material to the consideration of Question Number One:

Bernard Dempsey, the prosecutor in the case at bar, manifested a flagrant disregard for due process of law and the concept of a fair trial just as he did in the case of *United States vs. Kasouris*, 474 F.2d 689, Fifth Circuit Court of Appeals, Case No. 71-3569, when the Fifth Circuit said:

> "That the trial tactics of the prosecutor (Bernard Dempsey), as evidenced by the record, indicate a disregard for the fundamentals of due process."

That in the case at bar the prosecutor, without any notice to defense counsel, artfully, indelibly and unscrupulously solicited prejudicial matters on re-direct examination concerning money on the person of the victim, implying said money was covered with blood, which the victim allegedly had on his person the evening of the offense. The accusation of wrong doing is predicated upon the following reasons:

1. That the dollar bills were never shown to the defense counsel pursuant to the discovery order or ever referred to either on direct examination or cross-examination.

2. That the prosecutor should have taken the matters up outside the presence of the jury, knowing that the same would create a prejudicial issue, but he chose not to, knowing that "once you throw a skunk into the jury box, you can't instruct the jury not to smell it". (Appendix 6, p. 42)

3. That even after the admonishment of the Court and the objections to such inquiry sustained, the prosecutor once again disregarded the Court's admonishment and very adroitly solicited the prejudicial matter that the Court had sustained.

4. That notwithstanding the Court sustaining two objections to this unfair solicitation of prejudicial testimony, the prosecutor once again referred to it in his final argument by saying:

> "But I do recall that, after Gasper Ciaccio on the witness stand said on his person then, as testifying, he had something which he was carrying on the night of his beating, *that you (addressing the jury) were not permitted to have that object or evidence*

because of objection by defense counsel." (p. 39-Rebuttal) (Emphasis supplied) (Appendix 6, pp. 24, 25, 26, 27, & 28)

A second manifestation of prosecutorial misconduct which contributed to denying the defendants a fair trial in this cause was when the prosecutor suggested to the jury the existence of damaging evidence, and which, in fact, there was no such evidence offered other than the expressed representation of said evidence in front of the jury. More specifically, when defense counsel for the Charboniers was questioning the FBI agent concerning a conflict between the complaining witness telling the agent that the car in which the "alleged beating took place was a bloody mess", and that upon examination by the FBI there was no blood found in the car, the prosecutor stood up and stated an objection and said:

"I suggest the question is improper. It is untrue, but also improper." (Appendix 6, p. 28)

The wrongdoing is predicated upon the following:

1. That the prosecutor by such statement did tell the jury that there was blood found in the car and there was never any evidence of that in the trial.

2. That the Government had furnished defense counsel, prior to trial, an FBI document from the FBI laboratory indicating that no blood was found in the automobile, which was the only document provided defense counsel concerning matters relating to blood in the car. (Appendix 6, pp. 28, 29 & 30) (Appendix 7)

3. Mr. Dempsey further indicated during his final argument that defense counsel knew that blood had been found in the automobile. (Appendix 6, p. 30)

4. Mr. Dempsey further prejudiced the case by a very emotional argument concerning the fears of Dr. LoCicero's family *even to this day* during his closing argument, (Appendix 6, p. 38), and further compounded this "present fear" emotional argument when he solicited from witness Ciaccio his present fear of Raul and Luis Charbonier. (Appendix 6, pp. 34, 36) The basis for the wrongdoing is that:

(a) There was no evidence as to the fears of Dr. LoCicero's family introduced at any time during the trial, and the emotional approach was devestating despite the instruction to disregard.

(b) That the fear of Mr. Ciaccio at the time of the trial of Raul and Luis Charbonier was not relevant or material, *as the Court ruled,* and was only offered to suggest to the jury that there was a possible danger to Ciaccio if the defendants were acquitted.

5. That during the trial, FBI Agent Robert Buresh, volunteered an unresponsive answer on cross-examination suggesting that the case had "organized crime overtones" which response was artfully and indelibly planted in the minds of the jurors. This response created the dilemma of striking the same and causing more attention to it for letting it stand without instruction to disregard it - again prejudicing the natural hate for the defendants. (Appendix 6, p. 61)

6. Another gross expression of prosecutorial misconduct on the part of the prosecutor occurred during his opening statement when he advised the jury that they would hear evidence that showed that these defendants "specialized in this activity" referring to one who works people over to collect gambling debts. (Appendix 6, p. 40) The basis for the accusation of wrongdoing is predicated on:

(a) There was, in fact, no such evidence during the trial to support the unfounded statement of the prosecutor.

(b) this statement was made solely to inculcate a natural hatred on the part of the jurors directed toward the defendants.

7. Another act of misconduct on the part of the prosecutor was the allegation directed toward the attorney for Raul and Luis Charbonier in the presence of the jury, that a question on cross-examination was asked in "bad faith". That the Court made an expressed finding that said counsel was not acting in bad faith and it is submitted that the accusation of bad faith was another factor to contribute to prosecutorial misconduct during the trial. (Appendix 6, p. 37)

8. Another expression of prosecutorial misconduct is when the prosecutor solicited from the primary government witness, Gaspar Ciaccio, why he made a recording of the events that occurred on the night of the alleged offense, which solicitation included the response "because if anything happened to me, my wife would know what happened." The basis of the accusation for the allegation of wrongdoing is that such a remark was induced to prejudice the minds of the jury, particularly when it was learned later in the trial, after listening to the tapes outside the presence of the jury, that Gaspar Ciaccio's wife actually participated in the making of the recordings. (Appendix 6, p. 30 & 31)

9. That the prosecutor again solicited canned and prejudicial testimony when he asked a key government witness, Fano Ciaccio, on direct examination in an attempt to cushion the cross examination, why he lied in the State Court proceedings under oath about knowing

that his brother had been gambling in 1970, to which Mr. Dempsey solicited the response, "Because I was scared of the same thing happened to him that happened to my brother." The devil in this solicitation becomes noteworthy when it is learned by the own admission of the witness, that he went over the testimony at least four or five times in two to four hour sessions at a time with the prosecutor. (Appendix 6, p. 53). He gave much more damaging evidence directed toward the defendants in this cause, which he alleges as being truthful, thus making it incomprehensible that he would lie as to a relatively innocuous point. It is totally untenable from a standpoint of logic, and it is further submitted to this Court that the same is solicited on the part of the prosecutor only to prejudice the defendants in this cause. (Appendix 6, p. 31 and 32)

10. Another event instituted by the prosecutor in this cause occurred when he was allowed to "work with Fano Ciacio, over the weekend" and get him ready for the cross-examination after the witness had been tendered to defense counsel for cross-examination, but prior to cross-examination actually beginning. (Appendix 6, p. 53)

The following matters are relevant to the consideration of Questions Number One and Two:

That during rebuttal argument the prosecutor stated to the jury:

> "Defense counsel stated that, they were not there and he wasn't there - I want to point out to you, Ladies and Gentlemen, that the people who were there were all the witnesses who testified to the facts and all of the defendants, and they were there when this occurred; and you have the testimony as to what happened."

That not only does the prosecutor's comment contribute to the denial of a fair trial under the theory of prosecutor's misconduct, but further is a violation of the Fifth Amendment clause of the United States Constitution as it is a comment on the failure of the defendant to testify in his own behalf. *Griffin vs. State of California,* 85 S.Ct. 1229 (1965)

The following matters are relevant to the consideration of Question Number Three:

That government witness, Fano Ciaccio, admitted before the Trial Court that he lied under oath in the State proceedings involving the same defendants and same transactions, which formed the basis of the Federal Indictment in the case at bar.

That during the cross examination of Fano Ciaccio during the case at bar, it was so obvious that he was lying in this case that the government prosecutor stood up and said so in the presence of the jury.[1] (Appendix 6, p. 34)

That in view of the complete disregard for the sanctity and in view of the spirit and reasoning of the instruction that a convicted perjurer's testimony should be weighed with caution and great care, the undersigned attorney requested the instruction as follows:

> "That the testimony of an admitted perjurer should always be considered with caution and weighed with great care." Federal Jury Practice and Instructions, Devitt and Blackmar, §12.03.

which was denied as was the instruction of Falsus In Uno and Falsus In Omnibus requested and denied.

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[1] This admission on the part of the prosecutor is not as sanctimonious or laudible as it appears on the surface. See pp. 33, 34, 35, 36, & 37 of Appendix 6.

REASONS FOR GRANTING THE WRIT

This Court is faced with an issue which is more crucial than it may appear on the surface, not only crucial to the defendants in this cause, in that they were denied a fair trial because of the misconduct of the prosecutor during the trial process; but equally as important, this Court must, in the interest of protecting future defendants from prosecutorial misconduct, re-examine the basic rules of Appellate practice as they apply to cases of prosecutorial misconduct. It is submitted that the judicial reality of our times is that the Courts are overcrowded; the trial dockets are full; the dockets of the appellate Courts are crowded and congested. The Courts, both trial Courts and appellate Courts, are becoming more conscious of "economy" and "judicial administration" which permit the trial and appellate Courts to tolerate and excuse acts of prosecutorial misconduct and serve to condone such statements as quoted by the Fifth Circuit Court of Appeals in this cause, when they said about the prosecutorial misconduct complained of:

> "after reviewing the record of the incidents, statements and arguments alleged to have been prejudicial, we conclude that they were not so misleading, inflammatory or prejudicial as to deny the defendants a fair trial."

This Court must put all trial Judges, all appellate Courts and all prosecutors on notice that this Court is just as conscious of protecting one's rights to a fair trial when said right has been violated by the misconduct of a prosecutor during the trial of the cause, as it is when the right is violated by a law enforcement officer, whether it be through an illegal search and seizure, or an improper inducement of any

illegal confession. That trial Judges, appellate Courts and prosecutors must be put on notice that this Court will not allow "harmless error rationalizations", concerns with "judicial economy", or other meaningless sweeping euphemisms, such as:

> ". . . we conclude that they were not so misleading, inflammatory or prejudicial as to deny defendants a fair trial."

Can it not be said that when the trial Judge knows the Supreme Court of the United States is serious about protecting the right of a fair trial of every defendant and preventing prosecutorial misconduct, that said trial Judge will make that concept known to the trial prosecutor and thus the trial prosecutor will not continue to push to the "outer limits of legality" as the same prosecutor (Bernard Dempsey) did in *United States vs. Ragano,* 476 F.2d 410, and as he did in *United States vs. Kasouris,* 474 F.2d 689, where the appellate Court said:

> "That the trial tactics of the prosecutor (Bernard Dempsey), as evidenced by the record, indicate a disregard for the fundamentals of due process."

Prosecutors will know that the trial Judges of the appellate Courts will no longer tolerate Constitutional infirmaties, will no longer rationalize, will no longer be concerned with economy and will no longer be concerned with "judicial administration" which have also been excuses utilized by our Courts in tolerating prosecutorial misconduct.[2] It is submitted to this Court, the highest Court of our land, that tribute should be paid to the words of Judge Jerome Frank,

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[2] "Courtroom Misconduct by Prosecutors and Trial Judges, by Albert W. Alschuler, TEXAS LAW REVIEW, Volume 50, No. 4, April, 1972.

as expressed in his dissenting opinion in *United States vs. Antonelli, Fireworks Company,* 155 F.2d 631, 661, in which he said:

> "This Court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable . . . If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it . . . Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of ritualistic verbal spanking. The practice of this Court-recalling the bitter tear shed by the Walrus as he ate the oysters-breathes a deplorable cynical attitude toward the judiciary.

The case at bar is probably an excellent example of the attitude of trial Courts and appellate Courts where they, as humans, feel that the defendants are "probably guilty anyway" and do engage in rationalizations in order to justify the conclusions desirable. For example, the Court below adopted the government's complete preface of the statement of facts, expressed their own opinion as to the "crudeness of the scheme", concern themselves with judicial economy and administration and intentionally refuse to meet the issue of prosecutorial misconduct only to say that:

> ". . . we conclude that they were not so misleading, inflammatory or prejudicial as to deny defendants a fair trial."

That the Fifth Circuit in this cause, disregarded the precedent that they set in *Ginsburg vs. United States,* 257 F.2d 950; *Dugan Drug Stores, Inc. vs. United States,* 326 F.2d 835, (1964); *United States vs. Haynes,*

466 F.2d 1260, (1972); and *Odom vs. United States,* 377 F.2d 853. That in analogy, which the writer would consider directly in point with the case at bar, is the case of *Wagner vs. United States,* 363 F.2d 877, in which the prosecutor said during his closing argument:

> "They didn't let me do that. They objected."

and the Fifth Circuit held:

> "Defendant's case should not be prejudiced by criticizing their counsel for making reasonable objections to the introduction of testimony. Further, this criticism had a tendency to prejudice the defendants if their counsel should object to parts of the oral argument as improper."

Whereas, in the case at bar, that same course of conduct was only one of the many expressions of prosecutorial misconduct on the part of the prosecutor.

This Court can not allow other Courts to allocate due process of law to whomever defendants they so desire depending upon their own personal feelings as to the guilt or innocence of the accused or whatever equities may be involved in the cause. This Court must compel the compliance with the meaning and spirit of its prior decisions, such as in *Kotteakos vs. United States,* (66 S.Ct. 1239):

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

The Court further said in *Fahy vs. State of Connecticut,* 84 S.Ct. 229, and later adopted in *Chapman vs. State of California,* 87 S.Ct. 824, (1967), as follows:

> ". . . before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt."

It is submitted to this Court that, under the facts of this case, no Court could say beyond a reasonable doubt that the trial jury was not swayed by the misconduct of the prosecutor. *Chapman vs. State of California, supra.* Justice would be well served for this Court to take certiorari, review the record and ultimately place the umbrella of condemnation upon prosecutorial misconduct once and for all.

ANTINORI, COHEN & THURY, P.A.
406 N. Morgan Street
Tampa, Florida 33615
Attorney for Charboniers

BARRY A. COHEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Rule 33 of the Rules of this Court, on the 9th day of September, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, United States Department of Justice, Washington, D.C. 20530, and three additional copies were mailed to United States Attorney, Federal Building, Tampa, Florida. I further certify that all parties required to be served have been served.

BARRY A. COHEN

UNITED STATES of America, Plaintiff-Appellee,

v.

James BURKE, Louis Lopez and Henry Hill, Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellee,

v.

Raul CHARBONIER and Luis Charbonier, Defendants-Appellants.

Nos. 72–3742, 73–1045.

United States Court of Appeals, Fifth Circuit.

June 12, 1974.

Defendants were convicted before the United States District Court for the Middle District of Florida, Ben Krentzman, J., of making extortionate extensions of credit, using extortionate means of collecting debts, interstate travel in furtherance of extortion, interstate travel for promotion of an illegal gambling enterprise, and use of interstate telephone facilities in an unlawful gambling enterprise, and they appealed. The Court of Appeals, Gee, Circuit Judge, held that evidence was sufficient to support convictions; that victims' testimony about the operation of a gambling scheme constituted "verbal acts" rather than hearsay and were admissible; that defendants were not prejudicially misled by preliminary statement that the conspiracy rules of evidence were not applicable or by the failure of the prosecution to define the scope and purpose of any conspiracy or joint venture in crime; that trial court did not abuse its discretion by allowing prosecutor to "work with" witness over weekend in order to discuss upcoming

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cross-examination; that the trial court did not abuse its discretion in denying severance to certain defendants; and that the trial court's failure to specially instruct on admitted perjurious testimony and to apply the maxim "falsus in uno, falsus in omnibus" to particular witness' testimony was not error.

Affirmed.

1. Gaming ⇐98(1)
Threats ⇐7

Evidence was sufficient to sustain convictions of making extortionate extensions of credit, using extortionate means of collecting debts, interstate travel in furtherance of extortion, interstate travel for promotion of an illegal gambling enterprise and use of interstate telephone facilities in an unlawful gambling enterprise. 18 U.S.C.A. §§ 892, 894, 1952.

2. Criminal Law ⇐419(2)

Victims' testimony about operation of fraudulent gambling scheme concerning what one codefendant said or did constituted "verbal acts" or statements which were elements of extortion crimes charged rather than inadmissible hearsay. 18 U.S.C.A. §§ 892, 894, 1952.

3. Threats ⇐7

Victims' testimony concerning what codefendant, who organized extortionate gambling scheme, said or did was relevant and was properly admitted in evidence in the trial against remaining defendants. 18 U.S.C.A. §§ 892, 894, 1952.

4. Criminal Law ⇐423(1)

The acts of one partner in crime are admissible against the others when it is in furtherance of the criminal undertaking.

5. Criminal Law ⇐423(9)

Victims' testimony, concerning statements by the defendants residing in Miami that the defendants' "cousin from up north" would bring people down here "and get the money one

way or another," concerned statements which constituted the very activity in combination with which the remaining defendants were charged and were admissible and attributable to the other defendants. 18 U.S.C.A. §§ 892, 894, 1952.

6. Criminal Law ⇐662(1)

Where the declarants, as defendants, were unavailable to the government, there was sufficient indicia of reliability of the victims' statements concerning the declarants' statements and the references in victims' testimony were not crucial to the government's case nor devastating to the defense, the admission of victims' testimony concerning statements by codefendants referring to other defendants did not deny the other defendants the right to confront the witnesses against them. U.S.C.A.Const. Amend. 6.

7. Criminal Law ⇐1171.2

Where defendants were afforded full opportunity to present their objections to admission of victims' testimony concerning declarations and acts of a codefendant, and there was sufficient independent evidence to establish the existence of common understanding of criminal objective between all defendants, the defendants were not prejudiced by preliminary statement that the conspiracy rules of evidence were not applicable or by failure of the prosecution to define the scope and purpose of any conspiracy or joint venture in crime.

8. Witnesses ⇐414(2)

Victim's testimony about his statements to his treating doctor on the night after he was beaten by the defendants was admissible for purpose of supporting victim's story after the defense had attacked the story as recent fabrication even if the statements about his beating were not necessary for medical diagnosis or treatment.

9. Criminal Law ⇐422(1), 1169.7

Testimony of government agent relating to an interview with one defendant was irrelevant and thus inadmissible; the error in admitting such evidence was not prejudicial.

10. Witnesses ⇐367(1)

Where defendants did not show material differences from state trial in witness' testimony or any other way in which his testimony was biased by the state trial and the trial court had earlier ruled that evidence of the state acquittal was irrelevant, trial court properly refused to permit defendants to show the witness' bias by introducing statements by the witness, after defendants' acquittal in state court, that witness was unhappy with, and skeptical of, that trial's outcome.

11. Criminal Law ⇐666½

Where defense had full weekend to prepare its cross-examination and made no showing of any prejudice resulting from two-hour conference between witness and the prosecutor during the weekend, trial court did not abuse its discretion in granting permission for the prosecutor to "work with" witness over the weekend in order to discuss the upcoming cross-examination.

12. Criminal Law ⇐622(1)

Motion for severance is addressed to the discretion of the trial judge. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

13. Criminal Law ⇐622(1)

In order to challenge successfully the refusal of trial judge to grant a motion to sever, a defendant must show prejudice which results in the denial of a fair trial. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

14. Criminal Law ⇐622(2)

Trial court did not abuse its discretion in denying defendants a severance from codefendants even though defendants subpoenaed the codefendants as witnesses and timely moved for severance where there was no showing that the codefendants' testimony would be exculpatory in effect or would raise strong doubts as to defendants' guilt, there was no showing of antagonistic defenses and considerations of judicial economy and administration weighed heavily in favor of the denial.

Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.; U.S.C.A.Const. Amend. 14.

15. Criminal Law ⇐721(3)

Prosecutor's argument "* * * that the people who were there were all the witnesses who testified to the facts and all of the defendants, that they were there when this occurred; and you have all the testimony as to what happened." was not of such character that the jury would naturally and necessarily take it to be comment on failure of the accused to testify.

16. Criminal Law 1171.1(1, 2)

Record in prosecution for making extortionate extensions of credit, using extortion as means of collecting debts, interstate travel in furtherance of extortion, interstate travel for promotion of an illegal gambling enterprise and use of interstate telephone facilities in an unlawful gambling enterprise established that argument and actions of prosecutor were not so misleading, inflammatory or prejudicial as to deny defendants a fair trial. 18 U.S.C.A. §§ 892, 894, 1952.

17. Criminal Law ⇐785(15)

Where witness acknowledged during federal trial that his denial at state trial that he knew of his brother's gambling was false and was made because he had been afraid at the time to expose his knowledge of the gambling because of the treatment received by his brother and the witness had language difficulties, trial court's refusal to specially instruct the jury about admitted perjurious testimony and to apply the maxim "falsus in uno, falsus in omnibus" to the witness' testimony was not error.

18. Criminal Law ⇐201
Judgment ⇐828(3.10)

Federal government was not precluded by doctrines of double jeopardy and collateral estoppel from trying defendants on federal extortion charges because the defendants were

acquitted on state charges of kidnapping, extortion and assault with intent to murder. 18 U.S.C.A. §§ 892, 894, 1952.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM, AINSWORTH and GEE, Circuit Judges.

GEE, Circuit Judge:

On appeal from their conviction for various gambling and extortion offenses, appellants raise issues of sufficiency of the evidence, admission of inadmissible hearsay, denial of the right to confrontation, failure to sever the trial of Burke, Hill and Lopez from the trial of Raul and Luis Charbonier, prosecutorial misconduct, improper jury instructions, and collateral estoppel. Concluding that their contentions are meritless, we affirm the convictions.

In November, 1970, the United States indicted James Burke, Henry Hill, Louis Lopez, Raul Charbonier and Luis Charbonier[1] on five counts. The charges consisted of (1) making extortionate extensions of credit;[2] (2) using extor-

1. Cosmo Rosado ("Pupi"), the Charboniers' cousin, was indicted also, but he died shortly before trial.

2. In violation of 18 U.S.C.A. § 892:

§ 892. *Making extortionate extensions of credit*

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance or any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time the extension of credit was made.

tionate means of collecting debts;[3] (3) interstate travel in furtherance of extortion; (4) interstate travel for promotion

(2) The extention of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

3. In violation of 18 U.S.C.A. § 894:

§ 894. *Collection of extensions of credit by extortionate means*

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the exten-

of an illegal gambling enterprise; and (5) use of interstate telephone facilities in an unlawful gambling enterprise.[4]

The scheme that led to the indictments was crude but effective. Raul Charbonier owned the Char-Pal a combination lounge-liquor store in Tampa, Florida. His friend Gaspar Ciaccio also owned and operated, in conjunction with his brother Fano Ciaccio, a lounge-liquor store, the Temple Terrace Lounge, located not far from Charbonier's establishment.

sion of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

4. The last three counts in violation of 18 U.S.C.A. § 1952:

§ 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Early in 1970, Raul Charbonier approached Gaspar Ciaccio with a gambling proposition. Raul could obtain a rigged line or odds sheet on baseball games during the upcoming season from his cousin Pupi in New York, and he offered Ciaccio the opportunity to bet on the games using the line. Gaspar Ciaccio informed his friend Dr. Felix LoCicero of the opportunity and introduced him to Charbonier. In June, 1970, after Charbonier explained the scheme in detail to Ciaccio and LoCicero and enlisted them, they began betting. Charbonier guaranteed that the line was rigged so Ciaccio and Dr. LoCicero would win. The system allowed only bets on the team designated as the favorite in any particular game, at the odds specified. The gamblers could select any number of games on the list to bet on. Charbonier received the line by telephone from New York and phoned the daily lists to either Ciaccio or LoCicero.

The betting began with bush-league sums in early June, 1970. As promised, Ciaccio and LoCicero won consistently in the beginning, and they increased the amounts of their bets as the season progressed. By the All-Star game break in July, they had compiled $7,500–$8,000 in unpaid winnings. The wagers by that time had reached the major leagues—as much as $1,000 per game. The All-Star game marked the end of Ciaccio's and LoCicero's hitting streak. After winning the bet on that game, they began striking out consistently. By early August, both had not only lost their previously-compiled winnings but were deeply in the hole. Although they had paid in over $7,800, Ciaccio and LoCicero still owed over $13,000 when they called the game. When a friend of Ciaccio's, Tony Marchese (who was a bit more knowledgeable about gambling and baseball) saw one of the odds sheets Charbonier supplied Ciaccio, he informed Ciaccio, that, contrary to Charbonier's promise of a line rigged to win, the odds were deceptively rigged to insure losing bets. Ciaccio and LoCicero informed Charbonier that they refused to play any longer.

LoCicero paid Charbonier another $1,000 on August 24 and had no further contact with him until October 8. The Charboniers did not forget Ciaccio. Raul Charbonier pressed Ciaccio to pay his remaining losses several times between August and October. Ciaccio refused to pay the amount because he believed he had been duped. Once Charbonier assured Ciaccio that, if he did not pay the debt, Charbonier's cousin would come down from New York and "he would bring some people down here and get the money one way or another." Raul added to his lineup about that time by substituting his brother Luis as a pinch-hitter. In late August, Luis demanded that Ciaccio pay up. Ciaccio again refused.

To complete the lineup, Cosmo Rosado, James Burke, Henry Hill and Louis Lopez flew from New York to Tampa the night of October 8 arriving about 9:45 p.m. Rosado rented a car and informed the rental agent that he would use the car for an indeterminate time up to five days without a local address.

Around 10:30 that night, Luis Charbonier and Rosado, accompanied by the others from New York, accosted Ciaccio in his own lounge. After some serious haggling about Ciaccio's debt, Luis Charbonier and Rosado told Ciaccio to accompany them to Charbonier's lounge. When Ciaccio refused, Burke nudged a gun against his ribs. Having thus received an offer he couldn't refuse, Ciaccio went along, surrounded by the five antagonists. Foregoing any further pleasantries, Hill and Lopez, sitting on either side of Ciaccio in the back seat of the car on the way to the other lounge, began beating him. Lopez split open Ciaccio's forehead with a pistol. Hill and Lopez stated that they would kill Ciaccio, but that it would not be worthwhile since they wanted their $8,000.

Raul Charbonier greeted Ciaccio, when they arrived at the Char-Pal, with, "I told you this was going to happen to you, didn't I? I told you this." While at the Char-Pal, the collectors placed Ciaccio in the stockroom and beat on him some more. While Gaspar Ciaccio was enduring his status of punching bag, Raul Carbonier called Gaspar's brother, Fano

Ciaccio, at the Temple Terrace Lounge. Raul explained to Fano that they had his brother and they were "working him over." Raul said, "These fellows are from up North and they want their $8,000." Fano went to the Char-Pal Lounge to negotiate with Charbonier. After Fano explained he did not have the $8,000, Rosado told him that he could have a week to produce it. Subsequently, Raul Charbonier brought Gaspar back to the Temple Terrace Lounge. Some friends helped Gaspar change his bloody clothes and took him to a nearby hospital, where he was treated and the wound in his forehead was stitched up. Gaspar Ciaccio, who was away from work for a week after the beating, borrowed $8,000 from relatives and paid it to Charbonier by the end of the week.

Raul Charbonier had not forgotten LoCicero either. About midnight on the same night as Ciaccio's beating, Charbonier called LoCicero. Charbonier informed LoCicero that they had Gaspar, they had gasoline in the car, and they wanted to come over to see LoCicero. Charbonier agreed that, if LoCicero would promise to pay the balance in the morning, he would keep them away from him. LoCicero agreed. He offered a thumbnail sketch of his reaction: "I was scared as hell." At the earliest opportunity, he paid Raul Charbonier $4,000 to cancel the gambling debt.

Early on October 9, Rosado turned in the rental car at the airport. Rosado, Burke, Hill and Lopez returned to New York that same morning, flying through Miami.

On November 24, 1970, six days after the federal indictment was returned, state officials charged these defendants with kidnapping, extortion and assault with intent to murder Gaspar Ciaccio. The state case proceeded expeditiously and was tried in early March, 1971. All defendants were acquitted. The federal case was delayed by various legal maneuverings of the defendants until October, 1972. The trial court directed a verdict of not guilty on Count V as to Burke, Hill and Lopez, because no evidence of phone calls by them existed. The jury found the Charboniers guilty on all counts and

Burke, Hill and Lopez guilty on Counts I through IV. The court sentenced each individual to ten years' imprisonment.

Evidentiary Issues

[1] Burke, Hill and Lopez contend pro forma that the evidence was insufficient to sustain their convictions. The contention is frivolous in light of the overwhelming and detailed testimony by Ciaccio and others about these appellants' conduct. But Burke, Hill and Lopez seriously insist that massive infusions of inadmissible hearsay denied them a fair trial and their respective rights to confront the witnesses against them.[5]

[2] First, they complain of Ciaccio's and LoCicero's testimony about the operation of the gambling scheme during the spring and summer. They assert as inadmissible hearsay virtually everything the witnesses said that Raul Charbonier said or did. These statements, rather than hearsay, as appellants assert, were "verbal acts," statements which were elements of the crimes charged. With the exceptions discussed below, none of the statements or acts attributed to Charbonier referred to Burke, Hill and Lopez.

[3, 4] The issue, then, is whether this non-hearsay evidence was admissible in the trial against Burke, Hill and Lopez. Doubtless it was relevant. It established and detailed the gambling scheme which was the context for the extortionate extensions of credit and the extortionate collection methods. Additionally, the gambling supplied the element which made the interstate travel and use of interstate telephone facilities

5. The Charboniers do not brief but simply adopt, where applicable, the arguments of Burke, Hill and Lopez on the issues of inadmissible hearsay, severance and collateral estoppel. Where applicable, we reject the Charboniers' adoption of those arguments.

Burke, Hill and Lopez, in turn, do not brief but simply adopt, where applicable, the arguments of the Charboniers on the issues of prosecutorial misconduct, improper comment on defendants' failure to testify, denial of confrontation and due process as to witness Cram, and failure of the court to give requested instructions. Where applicable, we reject Burke's, Hill's and Lopez' adoption of those arguments.

illegal. No issue of prejudice or necessity for cautionary instructions arose because these defendants were not mentioned as involved in the original arrangements or operations of the gambling scheme. Whether these particular acts of Charbonier were attributable to Burke, Hill and Lopez was essentially irrelevant. As to them, it was only the action of October 8th to which federal criminal liability could be ascribed. To the extent the jury may have associated these defendants with the origination of the gambling, it was permissible under the traditional principle that the acts of one partner in crime are admissible against the others when it is in furtherance of the criminal undertaking. Orser v. United States, 362 F.2d 580, 585 (5th Cir. 1966).

The witnesses did relate a few statements by the Charboniers referring to Cosmo Rosado, the "cousin from up North" and to "people" that his cousin would "bring down here and get the money one way or another." Most clearly incriminating to these three appellants was the phone conversation between Raul Charbonier and LoCicero of October 8th, related by LoCicero on the witness stand:

> I received a telephone call and the words were, "Doc, this is Raul. They have Gaspar in the car. They have gasoline in the car. And they want to come over to see you. If you guaranty me you will pay the balance by tomorrow I will tell them not to come over."
>
> I related at that time that I thought that matter had been settled. Says, "No. They want their money now." Says, "Well you come to my office tomorrow and I will have the money for you." He said, "That is good enough for me." And hung up.

[5, 6] Again, these statements were not hearsay but were statements which constituted the very activity in combination with which the defendants were charged. As such, they were admissible and attributable to Burke, Hill and Lopez. Additionally, these statements did not deny these appellants the

Sixth Amendment right to confront the witnesses against them. Although the rationale for admission of these statements is not the co-conspirator exception to the hearsay rule,[6] the analysis of these "verbal acts" in light of the confrontation clause necessarily follows many of the same guidelines. The declarants, as defendants, were unavailable to the government; sufficient indicia of reliability, both as to Charbonier's threatening purpose and as to the reference on October 8th to "they," meaning Burke, Hill and Lopez,[7] was supplied by overwhelming independent evidence of these appellants' activities; also, in light of the direct evidence of Burke's, Hill's and Lopez' participation, references to "they" were not "crucial" to the government's case nor "devastating" to the defense. Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); Park v. Huff, 493 F.2d 923 (5th Cir. 1974); Davenport, The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv.L.Rev. 1378 (1972).

[7] Appellants insist not only that the evidence was inadmissible but that they were prejudicially misled by a preliminary statement that the conspiracy rules of evidence were not applicable and by the failure of the prosecution to define the scope and purpose of any conspiracy or joint venture in crime. We find no evidence in the record of disadvantage or prejudice to appellants. They were afforded full opportunity to present their objections, which they did—promptly, thoroughly and unctuously. The trial judge, at an appropriate time, found that sufficient independent evidence of the "co-partnership," "joint venture," or common undertaking of a criminal objective existed to establish that relationship between defendants, to reinforce the reliability of the extra-judicial

6. Thus we need not consider whether conspiracy must actually be charged in order to invoke that exception. Compare United States v. Harrell, 436 F.2d 606, 616 (5th Cir. 1970), with United States v. Williamson, 482 F.2d 508, 513 (5th Cir. 1973).

7. And Cosmo Rosado.

statements, and to furnish the necessary relevance of the evidence. Orser v. United States, *supra*, at 585.

[8, 9] Two more minor evidentiary questions warrant discussion. First, appellants insist that Gaspar Ciaccio's testimony about his statements to his treating doctor on the night of October 8th after his beating were inadmissible hearsay. Assuming appellants are correct that the statements about his beating were not necessary for medical diagnosis or treatment, the testimony was still admissible to support Ciaccio's story after the defense had attacked Ciaccio's story as a recent fabrication. McCormick, Evidence (2d) § 251 (1972). Secondly, appellants claim that the testimony of a government agent relating an interview with Raul Charbonier on November 13, 1970, was inadmissible. We agree that it was inadmissible simply as irrelevant, if for no other reason. During the interview, Charbonier denied the whole gambling and extortion scheme. Additionally, it was not in furtherance of the criminal goal for which defendants were charged. And it lacked any reference to any other defendant. Whatever effect the statement may have generated, however, it was not substantial or prejudicial enough to warrant reversal.

[10] Earl Cram, a witness, had seen Gaspar Ciaccio come out of his lounge on October 8th surrounded by four of the defendants and Rosado. After cross-examination of Cram, defendants sought to show his bias by introducing statements by Cram, after defendants' acquittal in state court, that he was unhappy with, and skeptical of, that trial's outcome. Defendants did not show material differences from the state trial in Cram's testimony or any other way in which his testimony was biased by the state trial outcome. Additionally, the district court had earlier ruled that evidence of the state acquittal was irrelevant and it was within his discretion to foreclose the defendants' attempt to refer to it.

[11] Direct examination of Gaspar Ciaccio lasted until late on a Friday afternoon before a three-day weekend. The district judge granted permission for the prosecutor to "work

with" Ciaccio over the weekend in order to discuss the upcoming cross-examination. Defendants urge that this deprived them of the "timely thrust of naturalness" inherently essential to cross-examination. The defense had the full weekend to prepare its cross-examination and they have not shown any prejudice resulting from the two-hour conference between Ciaccio and the prosecutor. Thus, we cannot say the district court abused its discretion in allowing it.

Severance

[12, 13] Appellants insist that the district court erred in failing to grant a severance of the Charboniers' trial from that of Burke, Hill and Lopez. Rule 14, F.R.Crim.P., provides that a motion for a severance is addressed to the discretion of the trial judge. Opper v. United States, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954); Smith v. United States, 385 F.2d 34 (5th Cir. 1967). To challenge successfully the refusal of a trial judge to grant a motion to sever, an appellant must show "prejudice resulting in the denial of a fair trial." United States v. Martinez, 486 F.2d 15 (5th Cir. 1973); United States v. Nakaladski, 481 F.2d 289 (5th Cir. 1973). In Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970), we enumerated guidelines for evaluating motions for severance based on a desire to offer exculpatory testimony of a co-defendant.[8]

[14] We agree that the defendants satisfied two of the criteria. (1) Burke, Hill and Lopez subpoenaed the Charboniers as witnesses and, although tardily, sufficiently communicated to the trial judge that they desired to use the Charboniers as witnesses; (2) the appellants timely made (although over a year after indictment) the requisite motions and renewed them during trial.

On the other hand, we cannot say that these appellants satisfied the other criteria sufficiently to warrant a conclusion

8. See United States v. Martinez, 486 F.2d 15, 22 (5th Cir. 1973), where we said that the Fourteenth Amendment due process criteria are similar to those of Rule 14, F.R.Crim.P.

that the district court abused its discretion. (1) The Charboniers filed affidavits which tracked exactly the language of the indictments but expressed it in the negative. These affidavits failed to clearly show what the Charboniers would have testified to. The movants made no showing that the Charboniers' testimony would be exculpatory in effect or would raise strong doubts as to Burke's, Hill's and Lopez' guilt. *Byrd, supra* at 1020–1021. (2) The likelihood that the Charboniers would testify if tried separately was enhanced by the Charboniers' affidavits to that effect, but that likelihood was diminished by the failure to show why the Charboniers would have been willing to testify at a separate trial but not in the joint one. The usual reason for such a strategy is inconsistent or antagonistic defenses—the testimony that exonerates the movant will implicate the co-defendant witness. *Byrd, supra* at 1022; United States v. Johnson, 478 F.2d 1129 (5th Cir. 1973). Appellants made no such showing to the trial judge. (3) Considerations of judicial economy and administration weigh heavily in favor of the district court's decision. By various manuevers defendants delayed commencement of the trial for almost two years after indictment, the trial itself required nearly three weeks, and separate trials would have required virtual duplication of great effort and expense.

Miscellaneous

[15] Appellants urge that the following remark by the prosecutor during rebuttal argument was improper comment on the failure of the defendants to take the stand:

> Defense counsel stated that, while they were not there and I wasn't there—I want to point out to you, ladies and gentlemen, that the people who were there were all the witnesses who testified to the facts and all of the defendants, and they were there when this occurred; and you have the testimony as to what happened.

In the context presented, countervailing arguments by counsel that neither the prosecutor's nor the defense counsel's state-

ments constitute evidence in the case, we cannot conclude that this statement " . . . was manifestly intended or was 'of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' " United States v. White, 444 F.2d 1274, 1278 (5th Cir. 1971).

[16] Appellants also insist that the prosecutor below engaged in other serious misconduct sufficient to deny them a fair trial. After reviewing the record of the incidents, statements and arguments alleged to have been prejudicial, we conclude that they were not so misleading, inflammatory or prejudicial as to deny defendants a fair trial.

[17] In the state trial, Fano Ciaccio had denied that he knew of his brother's gambling. At the federal trial, he acknowledged that his earlier statement was false and explained that he had been afraid at the time to expose his knowledge of the gambling because of the treatment received by his brother. Additionally, due to language difficulties Fano was confused and made misstatements on cross-examination which he or the prosecutor had to correct. On these factors, defense counsel requested the district judge to specially instruct the jury about admitted perjurious testimony and to apply the maxim "falsus in uno, falsus in omnibus" to Fano's testimony. The trial judge refused to so instruct the jury, but he allowed defense counsel to argue the point to the jury. In light of all the circumstances and the thorough instructions given by the court, we cannot conclude the failure to give these instructions was error. Cf. Luna v. Beto, 395 F.2d 35 (5th Cir. 1968).

[18] Finally, appellants' contention that the federal government was precluded by doctrines of double jeopardy and collateral estoppel from trying these defendants under these charges after the state court acquitted them is foreclosed by Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959), and Abbate v. United States, 359 U.S. 187, 79 S.Ct.

666, 3 L.Ed.2d 729 (1959); see United States v. Vaughan, 491 F.2d 1096 (5th Cir. 1974).

Affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX 2

NO. 73-1045

COURT OF AP.
FILED
AUG 9 1974
EDWARD W. WADSWORTH
CLE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAUL CHARBONIER and LUIS CHARBONIER,

Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITION FOR REHEARING

August 9 , 1974)

Before WISDOM, AINSWORTH and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA :

v. :

COSMO ROSADO, :
also known as Cosme Rosado,
also known as C. Rasano, :
also known as Casey Rosado, CASE NO. 70-237-Cr.T
also known as "Pupi"; :
LUIS CHARBONIER;
RAUL CHARBONIER, JR.; :
JAMES BURKE;
HENRY HILL; and :
LUIS LOPEZ
:

The Grand Jury charges:

COUNT ONE

On or about October 8, 1970, at Tampa, in Hillsborough County, Florida, in the Middle District of Florida,

COSMO ROSADO,
also known as Cosme Rosado,
also known as C. Rasano,
also known as Casey Rosado,
also known as "Pupi";
LUIS CHARBONIER;
RAUL CHARBONIER, JR.;
JAMES BURKE;
HENRY HILL; and
LUIS LOPEZ

as creditors, knowingly, intentionally and unlawfully did make and cause to be made an extortionate extension of credit within the meaning of Section 891(6), Title 18, United States Code, to Gaspar Ciaccio, and Dr. Felix LoCicero, as debtors, that is, said defendants had been engaged in a gambling enterprise and said defendants claimed that Gaspar Ciaccio and Dr. Felix LoCicero owed to said defendants the amount of $14,500 as a gambling debt and that with respect to which debt or claim it was

the understanding of the said defendants, the creditors, and Gaspar Ciaccio and Dr. Felix LoCicero, he debtors, that delay in making repayment and failure to make repayment could result in the use of violence and other criminal means to cause harm to the persons, reputations and properties of the said Gaspar Ciaccio and Dr. Felix LoCicero; in violation of Sections 2 and 892, Title 18, United States Code.

COUNT TWO

On or about October 8, 1970, at Tampa, in Hillsborough County, Florida, in the Middle District of Florida,

COSMO ROSADO,
also known as Cosme Rosado,
also known as C. Rasano,
also known as Casey Rosado,
also known as "Pupi";
LUIS CHARBONIER;
RAUL CHARBONIER, JR.;
JAMES BURKE;
HENRY HILL; and
LUIS LOPEZ

knowingly, intentionally and unlawfully participated in the use of an extortionate means as defined in Section 891(7), Title 18, United States Code, to collect from Gaspar Ciaccio and Dr. Felix LoCicero an extension of credit and to punish Gaspar Ciaccio for the non-repayment thereof, to wit, the defendants expressly and implicitly threatened the use of violence and other criminal means to cause harm to the persons, reputations and properties of the said Gaspar Ciaccio and Dr. Felix LoCicero and, in fact, defendants did use violence and other criminal means in causing harm to the person of the said Gaspar Ciaccio; all in violation of Sections 2 and 894, Title 18. United States Code.

COUNT THREE

On or about October 8, 1970, at Tampa, in Hillsborough County, Florida, in the Middle District of Florida,

COSMO ROSADO,
also known as Cosme Rosado,
also known as C. Rasano,
also known as Casey Rosado,
also known as "Pupi";
LUIS CHARBONIER;
RAUL CHARBONIER, JR.;
JAMES BURKE;
HENRY HILL; and
LUIS LOPEZ

knowingly, wilfully and unlawfully did travel and cause to travel in interstate commerce from New York City, New York, to Tampa, Florida, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, such unlawful activity being the extortion of persons residing in Tampa, Florida, in violation of the laws of the State of Florida, to wit: Florida Statutes Annotated, Section 836.05, and that thereafter the said defendants did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity; all in violation of Sections 2 and 1952, Title 18, United States Code.

COUNT FOUR

On or about October 8, 1970, at Tampa, in Hillsborough County, Florida, in the Middle District of Florida,

COSMO ROSADO,
also known as Cosme Rosado,
also known as C. Rasano,
also known as Casey Rosado,
also known as "Pupi";
LUIS CHARBONIER;
RAUL CHARBONIER, JR.;
JAMES BURKE;
HENRY HILL; and
LUIS LOPEZ

knowingly, wilfully and unlawfully did travel and cause to travel in interstate commerce from New York City, New York, to Tampa, Florida, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, such unlawful activity being a business enterprise involving gambling offenses in violation of the laws of the State of Florida, to wit: Florida Statutes Annotated, Sections 849.14 and 849.25, and that thereafter the said defendants did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity; all in violation of Sections 2 and 1952, Title 18, United States Code.

COUNT FIVE

That from on or about April 1, 1970, and continuing thereafter to on or about October 8, 1970, at Tampa, in Hillsborough County, Florida, in the Middle District of Florida,

COSMO ROSADO,
Also known as Cosme Rosado,
also known as C. Rasano,
also known as Casey Rosado,
also known as "Pupi";
LUIS CHARBONIER;
RAUL CHARBONIER, JR.;
JAMES BURKE;
HENRY HILL; and
LUIS LOPEZ

did use and cause to be used a facility in interstate commerce, that is, the telephone, between Tampa, Florida, and the State of New York, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, such unlawful activity being a business enterprise involving gambling offenses in violation of the laws of the State of Florida, to wit: Florida Statutes Annotated, Sections 849.14 and 849.25, and that thereafter the said defendants did perform and attempt to perform acts to promote,manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity; all in violation of Sections 2 and 1952, Title 18, United States Code.

A TRUE BILL

John L. Thompson
Deputy Foreman

JOHN L. BRIGGS
United States Attorney

By: Bernard H. Bergey Jr.
Assistant United States Attorney

IN THE CRIMINAL COURT OF RECORD
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

NO. 72808 DIVISION A

STATE OF FLORIDA INFORMATION FOR

VS ASSAULT WITH INTENT TO COMMIT MURDER IN THE FIRST DEGREE, KIDNAPPING AND EXTORTION

COSME ROSADO a/k/a Cosmo Rosado a/k/a C. Rosado a/k/a Casey Rosado (DEFENDANT)

FILED
MAR 12 1971
L. D. SIMMONS
CLERK CRIMINAL COURT

JUDGMENT

This is to certify that COSME ROSADO a/k/a Cosmo Rosado a/k/a C. Rosado a/k/a Casey Rosado was this day adjudged Not Guilty in the above entitled cause.

DONE AND ADJUDGED in Open Court at Tampa, Hillsborough County, Florida this 12th day of March, A. D., 19 71.

Carl C. Durrance
JUDGE

IN THE CRIMINAL COURT OF RECORD
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

NO. 72808 DIVISION A

STATE OF FLORIDA INFORMATION FOR

VS ASSAULT WITH INTENT TO COMMIT MURDER IN THE FIRST DEGREE, KIDNAPPING AND EXTORTION

RAUL CHARBONIER, JR. (DEFENDANT)

FILED
MAR 12 1971
L. D. SIMMONS
CLERK CRIMINAL COURT

JUDGMENT

This is to certify that RAUL CHARBONIER, JR. was this day adjudged Not Guilty in the above entitled cause.

DONE AND ADJUDGED in Open Court at Tampa, Hillsborough County, Florida this 12th day of March, A. D., 19 71.

Carl C. Durrance
JUDGE

Appendix 5

10

IN THE CRIMINAL COURT OF RECORD
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

NO. 72808

DIVISION A

STATE OF FLORIDA

INFORMATION FOR

VS

ASSAULT WITH INTENT TO COMMIT MURDER IN THE SECOND DEGREE; KIDNAPPING AND EXTORTION

LUIS CHARBONIER
(DEFENDANT)

FILED
MAR 12 1971
L. D. SIMMONS
CLERK CRIMINAL COURT

JUDGMENT

This is to certify that LUIS CHARBONIER, was this day adjudged Not Guilty in the above entitled cause.

DONE AND ADJUDGED in Open Court at Tampa, Hillsborough County, Florida this 12th day of March, A. D., 19 71.

Carl C. Durrance
JUDGE

IN THE CRIMINAL COURT OF RECORD
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

NO. 72808

DIVISION A

STATE OF FLORIDA

INFORMATION FOR

VS

ASSAULT WITH INTENT TO COMMIT MURDER IN THE FIRST DEGREE; KIDNAPPING AND EXTORTION

JAMES BURK
(DEFENDANT)

FILED
MAR 12 1971
L. D. SIMMONS
CLERK CRIMINAL COURT

JUDGMENT

This is to certify that JAMES BURK was this day adjudged Not Guilty in the above entitled cause.

DONE AND ADJUDGED in Open Court at Tampa, Hillsborough County, Florida this 12th day of March, A. D., 19 71.

Carl C. Durrance
JUDGE

REPORT
of the

LABORATORY

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

FBI, Miami

Date: 11/24/70
FBI File No. 166-5230
Lab. No. PC-F2747 JK

RAUL C. CHAMBONIER, JR.; LUIS CHAMBONIER; COSME ROSADO, aka Cosmo Rosado, "Pepi"; LUIS LOPEZ; UNSUBS, (TWO); GASPAR CIACCIO, DR. FELIX LO CICERO - VICTIMS; ITAR - EXTORTION

Specimens received 11/10/70

Q1 Front floor mat
Q2 Rear floor mat

Result of examination:

No blood was identified on specimen Q1 or Q2.

RECORDED
FILED
NOV 16 1970
FBI — Miami

APPENDIX 7

E-b

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-267

LUIS CHARBONIER AND RAUL CHARBONIER, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-5268

JAMES BURKE, HENRY HILL AND LOUIS LOPEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners in No. 74-5268 (the Burke petitioners) contend that their trial should have been severed from that of petitioners in No. 74-267 (the Charboniers). They also assert that they were prejudiced by the admission of hearsay, and that their federal trial was barred by their acquittal on similar state charges. The Charboniers adopt the double jeopardy claim of the Burke petitioners, proffer several claims of prosecutorial misconduct, and challenge the trial court's refusal to give two requested instructions.

After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of making extortionate extensions of credit, using extortionate means to collect debts, and interstate travel in aid of an unlawful gambling enterprise, in violation of 18 U.S.C. 892, 894, and 1952.[1] Petitioners Luis and Raul Charbonier also were convicted of using interstate telephone facilities in violation of 18 U.S.C. 1952. Each petitioner was sentenced to concurrent sentences totalling a term of ten years' imprisonment. The court of appeals affirmed (Charbonier Pet. App. I; 495 F. 2d 1226). Timely petitions for rehearing were denied on August 9, 1974. The Burke petition for a writ of certiorari was filed on September 9, 1974. The Charboniers petition for a writ of certiorari was filed on September 10, 1974, and therefore is out of time under Rule 22(2) of the Rules of this Court. In any event there is no issue in either petition justifying further review.

The evidence at trial showed that petitioner Raul Charbonier induced Gaspar Ciaccio and Feliz LoCicero to place bets on baseball games using an odds sheet he regularly received by telephone from New York. He assured them that the betting scheme was rigged in their favor (Tr. 499). But after initial success Ciaccio and LoCicero began losing consistently until their combined debts approximated $13,000. Advised by a friend that the odds were actually rigged to ensure losing bets, they discontinued play. Ciaccio refused to pay his remaining losses despite repeated demands from both Charboniers and a threat by Raul Charbonier to "bring some people down here and get the money one way or the other" (Tr. 527).

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[1]Cosmo Rosado was indicted with petitioners but died before trial.

On October 8, 1970, the Burke petitoners arrived from New York and, joined by petitioner Luis Charbonier, confronted Ciaccio about payment of his debt. When he proved recalcitrant, petitioner Burke nudged a gun against his ribs and Ciaccio accompanied the men to a lounge owned by petitioner Raul Charbonier (Tr. 544). In a car on the way to the lounge, and again at the lounge, Ciaccio was severely beaten (Tr. 568, 584). Ciaccio's brother Fano was summoned to the lounge by petitioner Raul Charbonier and given a week to produce $8,000 (Tr. 1306). Gaspar Ciaccio subsequently borrowed the money and paid the Charboniers. Also on the night of October 8 petitioner Raul Charbonier telephoned Lo Cicero and informed him that "they" had Gaspar, had gasoline in the car, and wanted to come and see him (Tr. 242). It was quickly agreed that if LoCicero paid the balance of his losses the next morning there would be no visit. LoCicero subsequently paid petitioner Raul Charbonier $4,000 to cancel the gambling debt (Tr. 248). On October 9 the Burke petitioners returned to New York.

1. Prior to trial the Burke petitioners filed motions for severance from the Charboniers. They submitted affidavits by the Charboniers, who asserted they would testify and exculpate the Burke petitioners if severance were granted. The motions were denied, and the court of appeals determined that the affidavits failed to show what the Charboniers would have testified to, why their testimony would have been exculpatory, or, most importantly, why they were willing to testify at a separate trial but not in the joint one (Charbonier Pet. App. I, p. A-17). After considering petitioners' interests in severance, as well as the countervailing factors of judicial economy and administration—petitioners had delayed commencement of the trial nearly two years after indictment,

the trial required almost three weeks, and separate trials would have required virtual duplication of effort and expense—the court concluded that the trial judge had not abused his discretion, and that petitioners had shown no prejudice depriving them of a fair trial. *Opper* v. *United States*, 348 U.S. 84. We rely on this reasoning. No picture of mutually exclusive or antagonistic defenses emerged at trial; the defendants conducted a unified defense.

2. The Burke petitioners allege that the admission of certain "hearsay" statements, especially testimony by the Ciaccios and LoCicero concerning threats made by Raul Charbonier, deprived them of their rights of confrontation and due process. However, as the court of appeals pointed out, most of the challenged statements concern events prior to October 8, and under the indictment were not the basis of the Burke petitioners' criminal liability. Most detrimental to the Burke petitioners were Raul Charbonier's call to LoCicero on October 8, telling him "they" had Ciaccio and were coming to see him, and his reminder to Fano Ciaccio on October 10 that, if the money were not paid within a week, "these fellows from up North" would be back to destroy the Ciaccios' lounge (Tr. 1327). But these statements were not hearsay; they were the very activity constituting the crime. Even if they were hearsay, they were admissible because there was "overwhelming independent evidence" (Charbonier Pet. App. I, p. A-14) both of the existence of a joint criminal venture to extort money and of the Burke petitioners' participation therein. *Fiswick* v. *United States*, 329 U.S. 211.

The Burke petitioners' contention that they were prejudicially misled by a preliminary statement of the trial court that the conspiracy rules of evidence were not applicable, and by the failure of the prosecution to define the scope and purpose of any conspiracy or joint venture in crime, was fully answered by the court of appeals (Charbonier Pet. App. I, pp. A-14 to A-15):

> We find no evidence in the record of disadvantage or prejudice to appellants. They were afforded full opportunity to present their objections, which they did—promptly, thoroughly, and unctuously. The trial judge, at an appropriate time, found that sufficient independent evidence of the "co-partnership," "joint venture," or common undertaking of a criminal objective existed to establish that relationship between defendants, to reinforce the reliability of the extra-judicial statements, and to furnish the necessary relevance of the evidence.

The suggestion that the statements were inadmissible absent a formal conspiracy count is not correct. See, *e.g., United States* v. *Talbot*, 470 F. 2d 158 (C.A. 6).

3. Relying on *Ashe* v. *Swenson*, 397 U.S. 436, petitioners contend that their federal conviction violates the double jeopardy clause and, at a minimum, that the testimony of Gaspar Ciaccio should have been excluded on the basis of collateral estoppel because he gave "identical testimony" about his beating and the threats against him during a state trial, on a charge of assault with intent to murder, which ended in petitioners' acquittal.[2]

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[2]Petitioners were charged with assault with intent to murder in the state trial, but claim that the jury was instructed on lesser included offenses. The record on appeal below did not include these instructions.

Collateral estoppel, however, relates to relitigation of issues "between the same parties in any future lawsuit," 397 U.S. at 443. It therefore does not prevent the government from using in the federal trial testimony previously given in a state trial. Moreover, collateral estoppel applies only to issues actually litigated and decided in the first case. Ciaccio's testimony was important to the state case against petitioners, but their acquittal did not necessarily imply the jury's utter rejection of Ciaccio's version of events; the defense in the state trial was that Ciaccio's beating was a private altercation rather than a murderous assault.

Nor did the federal trial place petitioners in double jeopardy. The federal crimes involved extortionate extensions of credit and interstate travel as part of a gambling enterprise; the state crimes related to the physical assault. Different facts were necessary to prove the different crimes, and therefore the subsequent federal trial did not place petitioners twice in jeopardy.

4. The Charboniers' claim of prosecutorial misconduct was rejected by the court of appeals, which concluded that the incidents, statements, and arguments complained of, taken together, did not deny them a fair trial (Charbonier Pet. App. I, p. A-18).

The Charboniers direct their most vigorous complaints to what they describe as efforts of the prosecutor to "insinuate" to the jury that Ciaccio's beating on October 8 was confirmed by evidence of blood on some dollar bills carried by Ciaccio and on the interior of a car. There was no evidence of such blood. But the record shows that petitioners' counsel, not the prosecutor, persisted at final argument in asking the jury to draw inferences from or about an F.B.I. laboratory report (showing a lack of blood) which, although furnished to the

defense before trial, was not introduced in evidence.[3] The court reprimanded counsel for this argument. In rebuttal, the prosecutor alluded to an "object or evidence" which he had not succeeded in introducing in evidence "because of objection by defense counsel." The prosecutor's reference was to blood-stained dollar bills that had been carried by Ciaccio, but which had not been admitted. The court admonished the prosecutor not to "refer to that further" and in a bench conference reprimanded him in language that is itself significant:

> Mr. Dempsey, what are you doing, you are either rising to or descending to the level of some of the defense's arguments in an attempt to respond; and I say for the record that some of it should be responded to; but I don't know of any way of doing it without compounding the error that shouldn't have been made. [Supp. Tr., Rebuttal at 40.]

The court gave a curative instruction; it informed the jury of the right of counsel to object to or move to strike out evidence and warned against "[prejudice] * * * because counsel may have made such objections or motions * * *" (Supp. Tr., Jury Charge at 28). The prosecutor's single allusion to excluded evidence was, as the trial judge recognized, an unfortunate attempt by the prosecutor to correct an erroneous impression created by petitoners' counsel, and any prejudice resulting from the reference was neutralized by the court's instructions.

Similarly, although the prosecutor once suggested that a defense question was asked in bad faith (Tr. 1197), and elicited from Fano Ciaccio that he was still afraid of the Charboniers (Tr. 1430), the court in each instance ameliorated any arguable prejudice by instructing the jury to

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[3]Supp. Tr., Argument at 31-32, 38-39.

disregard the remark or testimony. And, finally, the prosecutor's question to Gaspar Ciaccio inquiring why he made a tape recording of what happened to him (Tr. 606), was an attempt to lay a foundation for the admission of the tape; no misconduct was involved. Taken as a whole, the remarks and questions cited by petitioners, culled from a trial that spanned three weeks, fall well short of establishing prosecutorial misconduct resulting in denial of a fair trial. Cf. *Donnelly* v. *DeChristoforo*, 416 U.S. 637.

5. The Charboniers contend (Charbonier Pet. 9-10) that a remark of the prosecutor during final argument was a comment on their failure to testify. However, the Charboniers made no objection during trial. Nor is the prosecutor's argument, in context, such an obvious comment on the accused's failure to testify that it might be "plain error." The record shows that counsel for various petitioners injected the theme of "who were there" into the trial at several points, including an opening statement (Tr. 6) and final summation (Supp. Tr., Argument at 10, 89). Taken in context, therefore, the prosecutor's reminder to the jury in rebuttal that the people who were there were all the witnesses who testified and all of the defendants. was directed to the rhetoric of opposing counsel and not to the Charboniers' failure to testify. Moreover, the court specifically instructed the jury that no inference could be drawn from a defendant's failure to testify (Supp. Tr., Jury Charge at 29). As the court of appeals concluded, the prosecutor's statement was not intended to, nor would it inevitably, be taken by the jury as a comment on the failure to testify.

6. The Charboniers finally contend that the trial court erred by refusing to give instructions that the testimony of an "admitted perjurer" is to be scrutinized carefully.

They sought the instructions in connection with the testimony of Fano Ciaccio. The court of appeals determined, and the record confirms (Tr. 1396, 1420), that because of language difficulties Ciaccio became confused and on cross-examination made misstatements about whether he had previously discussed the case with the prosecutor. Ciaccio also conceded that at the state trial he had falsely denied knowing about his brother's gambling; he explained that he had been afraid to speak because of the treatment received by his brother (Tr. 1353). Although the trial judge did not give the requested instructions, he allowed defense counsel to argue to the jury the import of Ciaccio's apparent perjury (Tr. 2034). In addition, he gave a general instruction about the credibility of witnesses (Supp. Tr., Jury Charge at 31-32); this combination adequately covered the issues, although it did not use the words the Charboniers suggested. *Posey* v. *United States*, 416 F. 2d 545 (C.A. 5), certiorari denied, 397 U.S. 946; *United States* v. *Harvey*, 428 F. 2d 782 (C.A. 9). The judge did not abuse his discretion; petitioners have had a fair trial.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

DOJ-1974